

AMENDED IN ASSEMBLY MARCH 29, 2012

CALIFORNIA LEGISLATURE—2011–12 REGULAR SESSION

## ASSEMBLY BILL

**No. 1964**

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**Introduced by Assembly Member Yamada**

February 23, 2012

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An act to amend Section 12940 of the Government Code, relating to employment.

### LEGISLATIVE COUNSEL'S DIGEST

AB 1964, as amended, Yamada. Discrimination in employment: *religious accommodations*.

Existing law, the California Fair Employment and Housing Act, protects and safeguards the right and opportunity of all persons to seek, obtain, and hold employment without discrimination or abridgment on account of race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, genetic information, marital status, sex, gender, gender identity, gender expression, age, or sexual orientation. *Specifically, an employer or other covered entity is required to reasonably accommodate the religious belief or observance of an individual unless the accommodation would be an undue hardship on the conduct of the business of the employer or other entity.*

~~This bill would make nonsubstantive changes to these provisions.~~

*This bill would define undue hardship for the purposes of these protections against religious discrimination. The bill would include the practice of wearing religious clothing or a religious hairstyle, as defined, as a belief or observance covered by the protections.*

Vote: majority. Appropriation: no. Fiscal committee: ~~no~~-yes.  
State-mandated local program: no.

*The people of the State of California do enact as follows:*

SECTION 1. Section 12940 of the Government Code is amended to read:

12940. It is an unlawful employment practice, unless based upon a bona fide occupational qualification, or, except where based upon applicable security regulations established by the United States or the State of California:

(a) For an employer, because of the race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, genetic information, marital status, sex, gender, gender identity, gender expression, age, or sexual orientation of any person, to refuse to hire or employ the person or to refuse to select the person for a training program leading to employment, or to bar or to discharge the person from employment or from a training program leading to employment, or to discriminate against the person in compensation or in terms, conditions, or privileges of employment.

(1) This part does not prohibit an employer from refusing to hire or discharging an employee with a physical or mental disability, or subject an employer to any legal liability resulting from the refusal to employ or the discharge of an employee with a physical or mental disability, where the employee, because of his or her physical or mental disability, is unable to perform his or her essential duties even with reasonable accommodations, or cannot perform those duties in a manner that would not endanger his or her health or safety or the health or safety of others even with reasonable accommodations.

(2) This part does not prohibit an employer from refusing to hire or discharging an employee who, because of the employee's medical condition, is unable to perform his or her essential duties even with reasonable accommodations, or cannot perform those duties in a manner that would not endanger the employee's health or safety or the health or safety of others even with reasonable accommodations. Nothing in this part shall subject an employer to any legal liability resulting from the refusal to employ or the discharge of an employee who, because of the employee's medical condition, is unable to perform his or her essential duties, or cannot perform those duties in a manner that would not endanger the

1 employee's health or safety or the health or safety of others even  
2 with reasonable accommodations.

3 (3) Nothing in this part relating to discrimination on account of  
4 marital status shall do either of the following:

5 (A) Affect the right of an employer to reasonably regulate, for  
6 reasons of supervision, safety, security, or morale, the working of  
7 spouses in the same department, division, or facility, consistent  
8 with the rules and regulations adopted by the commission.

9 (B) Prohibit bona fide health plans from providing additional  
10 or greater benefits to employees with dependents than to those  
11 employees without or with fewer dependents.

12 (4) Nothing in this part relating to discrimination on account of  
13 sex shall affect the right of an employer to use veteran status as a  
14 factor in employee selection or to give special consideration to  
15 Vietnam-era veterans.

16 (5) (A) This part does not prohibit an employer from refusing  
17 to employ an individual because of his or her age if the law  
18 compels or provides for that refusal. Promotions within the existing  
19 staff, hiring or promotion on the basis of experience and training,  
20 rehiring on the basis of seniority and prior service with the  
21 employer, or hiring under an established recruiting program from  
22 high schools, colleges, universities, or trade schools do not, in and  
23 of themselves, constitute unlawful employment practices.

24 (B) The provisions of this part relating to discrimination on the  
25 basis of age do not prohibit an employer from providing health  
26 benefits or health care reimbursement plans to retired persons that  
27 are altered, reduced, or eliminated when the person becomes  
28 eligible for Medicare health benefits. This subparagraph applies  
29 to all retiree health benefit plans and contractual provisions or  
30 practices concerning retiree health benefits and health care  
31 reimbursement plans in effect on or after January 1, 2011.

32 (b) For a labor organization, because of the race, religious creed,  
33 color, national origin, ancestry, physical disability, mental  
34 disability, medical condition, genetic information, marital status,  
35 sex, gender, gender identity, gender expression, age, or sexual  
36 orientation of any person, to exclude, expel, or restrict from its  
37 membership the person, or to provide only second-class or  
38 segregated membership or to discriminate against any person  
39 because of the race, religious creed, color, national origin, ancestry,  
40 physical disability, mental disability, medical condition, genetic

1 information, marital status, sex, gender, gender identity, gender  
2 expression, age, or sexual orientation of the person in the election  
3 of officers of the labor organization or in the selection of the labor  
4 organization's staff or to discriminate in any way against any of  
5 its members or against any employer or against any person  
6 employed by an employer.

7 (c) For any person to discriminate against any person in the  
8 selection or training of that person in any apprenticeship training  
9 program or any other training program leading to employment  
10 because of the race, religious creed, color, national origin, ancestry,  
11 physical disability, mental disability, medical condition, genetic  
12 information, marital status, sex, gender, gender identity, gender  
13 expression, age, or sexual orientation of the person discriminated  
14 against.

15 (d) For any employer or employment agency to print or circulate  
16 or cause to be printed or circulated any publication, or to make  
17 any nonjob-related inquiry of an employee or applicant, either  
18 verbal or through use of an application form, that expresses,  
19 directly or indirectly, any limitation, specification, or discrimination  
20 as to race, religious creed, color, national origin, ancestry, physical  
21 disability, mental disability, medical condition, genetic information,  
22 marital status, sex, gender, gender identity, gender expression,  
23 age, or sexual orientation, or any intent to make any such limitation,  
24 specification, or discrimination. This part does not prohibit an  
25 employer or employment agency from inquiring into the age of  
26 an applicant, or from specifying age limitations, where the law  
27 compels or provides for that action.

28 (e) (1) Except as provided in paragraph (2) or (3), for any  
29 employer or employment agency to require any medical or  
30 psychological examination of an applicant, to make any medical  
31 or psychological inquiry of an applicant, to make any inquiry  
32 whether an applicant has a mental disability or physical disability  
33 or medical condition, or to make any inquiry regarding the nature  
34 or severity of a physical disability, mental disability, or medical  
35 condition.

36 (2) Notwithstanding paragraph (1), an employer or employment  
37 agency may inquire into the ability of an applicant to perform  
38 job-related functions and may respond to an applicant's request  
39 for reasonable accommodation.

1 (3) Notwithstanding paragraph (1), an employer or employment  
2 agency may require a medical or psychological examination or  
3 make a medical or psychological inquiry of a job applicant after  
4 an employment offer has been made but prior to the  
5 commencement of employment duties, provided that the  
6 examination or inquiry is job related and consistent with business  
7 necessity and that all entering employees in the same job  
8 classification are subject to the same examination or inquiry.

9 (f) (1) Except as provided in paragraph (2), for any employer  
10 or employment agency to require any medical or psychological  
11 examination of an employee, to make any medical or psychological  
12 inquiry of an employee, to make any inquiry whether an employee  
13 has a mental disability, physical disability, or medical condition,  
14 or to make any inquiry regarding the nature or severity of a physical  
15 disability, mental disability, or medical condition.

16 (2) Notwithstanding paragraph (1), an employer or employment  
17 agency may require any examinations or inquiries that it can show  
18 to be job related and consistent with business necessity. An  
19 employer or employment agency may conduct voluntary medical  
20 examinations, including voluntary medical histories, which are  
21 part of an employee health program available to employees at that  
22 worksite.

23 (g) For any employer, labor organization, or employment agency  
24 to harass, discharge, expel, or otherwise discriminate against any  
25 person because the person has made a report pursuant to Section  
26 11161.8 of the Penal Code that prohibits retaliation against hospital  
27 employees who report suspected patient abuse by health facilities  
28 or community care facilities.

29 (h) For any employer, labor organization, employment agency,  
30 or person to discharge, expel, or otherwise discriminate against  
31 any person because the person has opposed any practices forbidden  
32 under this part or because the person has filed a complaint, testified,  
33 or assisted in any proceeding under this part.

34 (i) For any person to aid, abet, incite, compel, or coerce the  
35 doing of any of the acts forbidden under this part, or to attempt to  
36 do so.

37 (j) (1) For an employer, labor organization, employment agency,  
38 apprenticeship training program or any training program leading  
39 to employment, or any other person, because of race, religious  
40 creed, color, national origin, ancestry, physical disability, mental

1 disability, medical condition, genetic information, marital status,  
2 sex, gender, gender identity, gender expression, age, or sexual  
3 orientation, to harass an employee, an applicant, or a person  
4 providing services pursuant to a contract. Harassment of an  
5 employee, an applicant, or a person providing services pursuant  
6 to a contract by an employee, other than an agent or supervisor,  
7 shall be unlawful if the entity, or its agents or supervisors, knows  
8 or should have known of this conduct and fails to take immediate  
9 and appropriate corrective action. An employer may also be  
10 responsible for the acts of nonemployees, with respect to sexual  
11 harassment of employees, applicants, or persons providing services  
12 pursuant to a contract in the workplace, where the employer, or  
13 its agents or supervisors, knows or should have known of the  
14 conduct and fails to take immediate and appropriate corrective  
15 action. In reviewing cases involving the acts of nonemployees, the  
16 extent of the employer's control and any other legal responsibility  
17 that the employer may have with respect to the conduct of those  
18 nonemployees shall be considered. An entity shall take all  
19 reasonable steps to prevent harassment from occurring. Loss of  
20 tangible job benefits shall not be necessary in order to establish  
21 harassment.

22 (2) The provisions of this subdivision are declaratory of existing  
23 law, except for the new duties imposed on employers with regard  
24 to harassment.

25 (3) An employee of an entity subject to this subdivision is  
26 personally liable for any harassment prohibited by this section that  
27 is perpetrated by the employee, regardless of whether the employer  
28 or covered entity knows or should have known of the conduct and  
29 fails to take immediate and appropriate corrective action.

30 (4) (A) For purposes of this subdivision only, "employer" means  
31 any person regularly employing one or more persons or regularly  
32 receiving the services of one or more persons providing services  
33 pursuant to a contract, or any person acting as an agent of an  
34 employer, directly or indirectly, the state, or any political or civil  
35 subdivision of the state, and cities. The definition of "employer"  
36 in subdivision (d) of Section 12926 applies to all provisions of this  
37 section other than this subdivision.

38 (B) Notwithstanding subparagraph (A), for purposes of this  
39 subdivision, "employer" does not include a religious association

1 or corporation not organized for private profit, except as provided  
2 in Section 12926.2.

3 (C) For purposes of this subdivision, “harassment” because of  
4 sex includes sexual harassment, gender harassment, and harassment  
5 based on pregnancy, childbirth, or related medical conditions.

6 (5) For purposes of this subdivision, “a person providing services  
7 pursuant to a contract” means a person who meets all of the  
8 following criteria:

9 (A) The person has the right to control the performance of the  
10 contract for services and discretion as to the manner of  
11 performance.

12 (B) The person is customarily engaged in an independently  
13 established business.

14 (C) The person has control over the time and place the work is  
15 performed, supplies the tools and instruments used in the work,  
16 and performs work that requires a particular skill not ordinarily  
17 used in the course of the employer’s work.

18 (k) For an employer, labor organization, employment agency,  
19 apprenticeship training program, or any training program leading  
20 to employment, to fail to take all reasonable steps necessary to  
21 prevent discrimination and harassment from occurring.

22 (l) (1) For an employer or other entity covered by this part to  
23 refuse to hire or employ a person or to refuse to select a person  
24 for a training program leading to employment or to bar or to  
25 discharge a person from employment or from a training program  
26 leading to employment, or to discriminate against a person in  
27 compensation or in terms, conditions, or privileges of employment  
28 because of a conflict between the person’s religious belief or  
29 observance and any employment requirement, unless the employer  
30 or other entity covered by this part demonstrates that it has explored  
31 any available reasonable alternative means of accommodating the  
32 religious belief or observance, including the possibilities of  
33 excusing the person from those duties that conflict with his or her  
34 religious belief or observance or permitting those duties to be  
35 performed at another time or by another person, but is unable to  
36 reasonably accommodate the religious belief or observance without  
37 undue hardship on the conduct of the business of the employer or  
38 other entity covered by this part. Religious belief or observance,  
39 as used in this section, includes, but is not limited to, observance  
40 of a Sabbath or other religious holy day or days, ~~and~~ reasonable

1 time necessary for travel prior and subsequent to a religious  
2 observance, *and the practice of wearing religious clothing or a*  
3 *religious hairstyle.*

4 (2) *For the purposes of this subdivision, an accommodation is*  
5 *not reasonable if the accommodation requires segregation of an*  
6 *employee from customers or the general public.*

7 (3) *As used in this subdivision, the following terms have the*  
8 *following meanings:*

9 (A) *“Undue hardship” means a significant difficulty or expense*  
10 *on the conduct of the employer’s or other covered entity’s*  
11 *operations. In determining whether an action would result in an*  
12 *undue hardship, factors to be considered shall include the*  
13 *following:*

14 (i) *The nature and cost of the accommodation.*

15 (ii) *The overall financial resources of the facility or facilities*  
16 *involved in providing the accommodation, the number of persons*  
17 *employed at the facility, the effect of the accommodation on*  
18 *expenses and resources, and other impacts of the accommodation*  
19 *upon the operation of the facility.*

20 (iii) *The overall financial resources of the employer or other*  
21 *covered entity, the number of its employees, and the number, type,*  
22 *and location of its facilities.*

23 (iv) *The type of operation or operations of the employer or other*  
24 *covered entity, including the composition, structure, and functions*  
25 *of its workforce.*

26 (v) *The geographic distance from, or the administrative or fiscal*  
27 *relationship of, a facility or facilities to the employer or other*  
28 *covered entity.*

29 (vi) *The safety and health requirements for a facility, including*  
30 *requirements for the safety of other employees and any other*  
31 *person whose safety may be adversely impacted by the*  
32 *accommodation.*

33 (B) *“Wearing religious clothing or a religious hairstyle” means*  
34 *any of the following:*

35 (i) *Wearing religious apparel that is part of the observance of*  
36 *the religious faith practiced by the individual.*

37 (ii) *Wearing jewelry or an ornament that is part of the*  
38 *observance of the religious faith practiced by the individual.*

39 (iii) *Carrying an object that is part of the observance of the*  
40 *religious faith practiced by the individual.*



1     (iv) *Adopting the presence, absence, or style of a person's hair*  
2     *or beard that is part of the observance of the religious faith*  
3     *practiced by the individual.*

4     (m) For an employer or other entity covered by this part to fail  
5     to make reasonable accommodation for the known physical or  
6     mental disability of an applicant or employee. Nothing in this  
7     subdivision or in paragraph (1) or (2) of subdivision (a) shall be  
8     construed to require an accommodation that is demonstrated by  
9     the employer or other covered entity to produce undue hardship  
10    to its operation.

11    (n) For an employer or other entity covered by this part to fail  
12    to engage in a timely, good faith, interactive process with the  
13    employee or applicant to determine effective reasonable  
14    accommodations, if any, in response to a request for reasonable  
15    accommodation by an employee or applicant with a known physical  
16    or mental disability or known medical condition.

17    (o) For an employer or other entity covered by this part, to  
18    subject, directly or indirectly, any employee, applicant, or other  
19    person to a test for the presence of a genetic characteristic.